

Privacy MVP: Cooley's Michael Rhodes

By **Sindhu Sundar**

Law360, New York (December 7, 2015, 10:48 PM ET) -- Cooley LLP partner Michael Rhodes has helped major online companies navigate the murky terrain of who bears liability for data breaches, scoring a big win for eBay when he persuaded a federal court to dismiss a proposed class action over millions of users' exposed personal information and landing on Law360's list of Privacy MVPs for 2015.

The May ruling was among the most significant not just for Rhodes but also for major online companies scrambling to deflect liability claims by consumers exposed by data breaches. The eBay Inc. suit was filed in July 2014 by Collin Green, an eBay account holder who sued over a breach that the e-commerce giant had announced earlier that year.

Green had claimed that the breach exposed highly sensitive personal information including customers' names and encrypted passwords, accusing eBay of failing to properly secure its customers' information and keeping customers in the dark about the extent of their private information that it stores.

But eBay prevailed on its motion to dismiss, when Rhodes, a longtime attorney for the company, led the defense team arguing that Green had not shown actual customer injury from the data breach, a pivotal argument in data breach litigation, he said. Green chose not to appeal the decision.

"Injury analysis has been central to the world of privacy and data breach litigation," Rhodes said. "The question is whether anyone has been harmed. Just the fact that you might worry more about whether your information might be stolen as a result of a breach isn't enough to make a claim. You must have suffered an injury not in the abstract — you must show something more tangible."

Rhodes has represented eBay in some of its earliest major wins, including in the seminal *Gentry v. eBay* case in 2002 in the California Court of Appeal. In that case, Rhodes helped persuade the court that under state law, eBay could not be held liable for information posted by third parties.

MVP

PRIVACY



Michael Rhodes
Cooley

The decision helped Rhodes make his mark in privacy litigation, in a case that crystallized some of the earliest disputes plaguing Internet companies, by addressing the question of whether a website's hosts are liable for content posted by its users.

In recent years, some of Rhodes' high-profile work has involved the thorny issue of whether Google Inc.'s automated processing of Gmail constitutes an interception of personal information. In March 2014, Rhodes scored a major win for the tech giant by persuading a California federal court not to certify a multibillion-dollar proposed class action accusing it of analyzing the content of Gmail accounts without obtaining consent from the sender or the recipient of the emails.

Google used communication metadata to build secret user profiles that the company exploited to deliver targeted advertisements without having to pay "traffic acquisition costs" to third-party harvesters, the plaintiffs had claimed.

Rhodes continued helping Google gain an upper hand in the cases this year, securing a victory for the company in February in a Massachusetts state court case brought by Debra Marquis. Her suit had similarly claimed that Google was scanning Gmail users' emails for keywords used to display targeted advertisements to its users, bringing claims under the Massachusetts Wiretapping Act.

Rhodes convinced the court to grant Google's motion for summary judgment, arguing that its reviews were done in an automated way.

"What plaintiffs are doing is taking a modern technology or business model and trying to shoehorn their claims about them under antiquated statutes passed in a time when Congress probably never envisioned such an interpretation," Rhodes said. "That's the nub of what I do — taking what we think of as easy to understand today and explain how people are trying to apply them to older laws that were trying to solve a different purpose."

--Additional reporting by Juan Carlos Rodriguez.

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